

R.D. # 0010-05
New Jersey

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

ACCREDITED HEALTH SERVICES, INC.
Employer

and

CASE 22-RC-12616

**SEIU 1199 NEW JERSEY HEALTH CARE
UNION, AFL-CIO**
Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION:

The Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, seeking to represent a unit of all full-time and regular part-time certified home health aides employed by the Employer from its New Jersey facilities.¹ The Employer agreed with the unit description and identified its New Jersey facilities as Hackensack, East Orange, Jersey City, Edison and Toms River. Nonetheless, the Employer asserted that the petition should be dismissed for two reasons: (1) the unit is expanding; and (2) there is

¹ Although there were no record amendments to the unit description, the record reflects, and the parties agree, that all the certified home health aides petitioned for work a per diem schedule and, as such, there are no regular full-time employees.

insufficient time under the *Davison-Paxton*² formula to determine the eligibility of a significant number of its per diem staff.

Based on the following facts and analysis, I find that the unit expansion has been substantially completed and does not bar an election.³ I also find that the *Davison-Paxton* formula may be applied to the period between the date of hire and the date of eligibility for those former Helping Hands employees, as described below, to ascertain which employees have worked an average of four hours per week.⁴

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,⁵ the undersigned finds:

- (1) The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- (2) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.⁶
- (3) The labor organization involved claims to represent certain employees of the Employer.⁷

² *Davison-Paxton Co.*, 185 NLRB 21 (1970) provides that any employee who regularly averages four hours or more per week for the last quarter (13 weeks) prior to the eligibility date has a sufficient community of interest for inclusion in the unit and may vote in the election.

³ The parties stipulated there is no contract or other bar to an election in this matter.

⁴ Those former Helping Hands employees who cannot report any hours of work between date of hire and date of eligibility, or insufficient hours to meet the *Davison-Paxton* standard will vote subject to challenge, their eligibility to be determined, if necessary, at a later date.

⁵ Briefs filed by the parties have been carefully considered.

⁶ The Employer is a New Jersey corporation engaged in the provision of home health care services from its New Jersey locations: Hackensack, East Orange, Jersey City, Edison and Toms River. During the preceeding 12 months, the Employer has derived gross revenue of more than \$250,000 from this enterprise and has received goods in excess of \$50,000 from suppliers outside the state of New Jersey.

⁷ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

- (4) A question affecting commerce exists concerning the representation of certain employees of the Employer.
- (5) The appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is described as follows:

All certified home health aides employed by the Employer from its New Jersey locations, excluding all office clerical employees, professional employees, guards and supervisors as defined by the Act.⁸

II. FACTS:

A. Position of the Parties

The Petitioner filed its petition on May 13, 2005. On April 11, 2005, the Employer, who prior to that date had a complement of 690 certified home health aides, bought some of the assets of an apparently unrelated similar employer, identified as Helping Hands. The record shows the purchased assets as being the client list and the employee list of the prior enterprise. Between April 11, 2005, and May 22, 2005, the first start date for the new employees, the Employer provided in-service training for the approximately 400 former Helping Hands employees it contemplated hiring. Of those 400 potential employees, a projected 300 will turn in payroll hours for their first payroll period, June 1, 2005. The other approximately 100 employees had not scheduled work hours by the time of the hearing in this matter conducted on May 31, 2005. The Employer asserts the petition should be dismissed because the unit is still expanding and a representative complement of employees have not been employed for a substantial enough period of time under *Davison-Paxton* to

⁸ The unit description is in accord with the position of the parties.

be considered regular employees. In the alternative, the Employer urges that any election directed be stayed for a period of 13 weeks from May 22, 2005, the start date for the former Helping Hands employees.

Petitioner contends that even before the former Helping Hands employees were considered for hire, the Employer's original compliment of 690 certified home health aides met the Board's numerical standard for measuring a substantial and representative compliment of employees, i.e., 30% of employees in 50% of the job titles. As 690 original employees comprises 63% of the potential unit of 1090 employees, and there is only one job title, certified home health aide, Petitioner counters that the Employer has not met its burden on the expanding unit issue. As to the second issue, application of the *Davison-Paxton* standard, the Board does not mandate that only the 13 week employment standard described therein is appropriate but rather permits an alternative period of hire dates to eligibility dates or even to the election date to ascertain an average of four hours worked per week. Thus, Petitioner seeks an immediate election.

B. Background

The Employer provides home health care aides to care for patients in their homes. Each employee is a per diem employee and each employee determines how many hours he or she will work in a given payroll period. The Employer maintains a roster of employees who are available for assignment. When an aide is needed, a supervisor makes a call to an aide and offers the assignment. The aide is free to accept or reject the offer. The hours of work vary from assignment to assignment, ranging anywhere from 2 to 50-60 hours per week. The workforce is predominantly

female and that results in specific fluctuation in the number of employees available for assignment in the summer months when schools are out and employees have their own childcare responsibilities.

For an average payroll period the Employer will issue about 500 payroll checks. That does not necessarily mean that 500 aides have worked in that given payroll period, merely that 500 aides reported hours worked, hours that could have been accumulated during earlier payroll periods.

The acquisition of the patient care and employee lists from Helping Hands has not changed working conditions to any substantial degree. Variable working hours are an industry standard. After acquiring Helping Hands, the Employer merged the Paterson location with Hackensack and the Verona location with East Orange. Other than perhaps receiving assignments through a different location, all the aides share a salary scale of \$8.00 to \$8.50 per hour; all have the same supervision and the same flexibility of schedule. Upon being employed by their new Employer, the former Helping Hands employees received the same benefits as the Employer's aides received. Thus, there is no dispute as to unit size, composition or community of interest.

III. LEGAL ANALYSIS:

The only issues before me are whether the Employer has met its burden under the expanding unit analysis and whether the Employer's interpretation of the *Davison-Paxton* requirements are correct, i.e., that the newly hired employees be employed for a minimum of 13 weeks before the date of the election and show an average of 4 hours worked per week.

It is well settled Board law, reiterated again in *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000), citing to *Toto Industries (Atlanta)*, 323 NLRB 645 (1997) and *General Cable Corp.*, 173 NLRB 251 (1968), that the Board will direct an immediate election when approximately 30% of the eventual employee complement is employed in 50% of the job classifications. In the instant case there is only one job classification. Thus, job classification is not an issue.

Looking to the numbers, the Employer had a complement of 690 employees before hiring approximately 400 employees from Helping Hands. That results in an active roster of potentially 1090 employees. But the 690 employees the Employer had prior to hiring the new employees were already 63% of the unit, well beyond the 30% standard favored by the Board. Based on these numbers, I find the Employer's assertion that the unit has not expanded significantly enough to allow for an immediate election to be without merit.

Turning to the second issue, the application of the *Davison-Paxton* standard, I find that there is no basis for the Employer's claim that the standard mandates a full 13 week period of employment to determine if the newly-hired employees have worked an average of four hours per week during that time. Nor is there any support for the Employer's argument that the number of per diem employees in anyway affects the application of that standard in prior Board cases. The Employer has suggested that a departure from the standard 13 week period would subject a large number of newly-hired per diem employees to a different standard than that applied to the longer hired per diem employees, thus, in effect, creating a two-tiered eligibility system. None of the cases cited by the Employer support that assertion. Instead, in

New York Display and Die Cutting Corp., 341 NLRB No. 121 (2004), the Board specifically dealt with the determination of eligibility of a part-time employee hired nine days before an election. Noting *Davison-Paxton*, and especially its citation in *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99 (2003), the Board stated that brevity of employment is not, by itself, a reason for denying eligibility and overturned a hearing officer's decision that 10 days from date of hire to election was too short a period to determine eligibility. Nor is there any case cited by the Employer that mandates a different result pursuant to the number of eligibles to which this lesser period of employment is applied. The Employer's reliance on *Steppenwolfe Theatre Co.*, 342 NLRB No. 7 (2004) is misplaced. There, the Board determined that the use of the *Julliard* standard⁹ was inappropriate and the correct measure of eligibility was that delineated in *Davison-Paxton*. The focus in *Steppenwolfe* and in the Board cases cited above is the regularity of the per diem employment, not the number of employees.

Accordingly, I find that a unit of all certified home health aides employed by the Employer from its New Jersey facilities is an appropriate unit for collective bargaining.

IV. DIRECTION OF ELECTION:

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the

⁹ The *Julliard* standard states that employees are eligible when they worked two productions for a total of 5 days over one year or at least 15 days over a two-year period. *Julliard*, 208 NLRB 153 (1974).

payroll period ending immediately before the date of this Decision,¹⁰ including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **SEIU 1199 New Jersey Health Care Union, AFL-CIO**.

V. LIST OF VOTERS:

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the

¹⁰ As noted in ftn.4 above, those former Helping Hands employees who cannot report any hours of work between date of hire and date of eligibility, or insufficient hours to meet the *Davison-Paxton* standard will vote subject to challenge, their eligibility to be determined, if necessary, at a later date. Thus, I am rejecting the Employer's request to stay the election for a period of 13 weeks from May 22, 2005, the start date for the former Helping Hands employees.

election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list for the voting groups found appropriate above, containing the full names and addresses of all the eligible voters in each voting group, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before **June 30, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW:

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **July 7, 2005**.

Signed at Newark, New Jersey this 23^d day of June 2005.

/s/ Edward J. Peterson
 Edward J. Peterson
 Acting Regional Director
 NLRB Region 22
 20 Washington Place, 5th Floor
 Newark, New Jersey 07102

